

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION**

Dale Joseph Burke,)	
)	ORDER
Plaintiff,)	
)	
vs.)	
)	Case No. 1:07-cv-004
North Dakota Department of Correction)	
and Rehabilitation,)	
)	
Defendant.)	

On January 23, 2007, the plaintiff, Dale Burke, initiated a civil rights action under 42 U.S.C. § 1983 in which he raised a myriad of claims. See Docket No. 2. On May 16, 2007, the Court conducted a preliminary screening of Burke's complaint under 28 U.S.C. § 1915A and dismissed claims 1, 5, 8, and 9 without prejudice, dismissed claim 15 with prejudice, and found the remaining claims (claims 2, 3, 4, 6, 7, 10, 11, 12, 13, 14, 16, and 17) cognizable. See Docket No. 4. On May 1, 2008, the Defendant filed a motion for summary judgment. See Docket No. 40. After the Court granted Burke several extensions of time to respond to the motion, Burke filed a response in opposition to the motion on November 5, 2008. See Docket No. 70. The Defendant filed a reply brief on December 12, 2008. See Docket No. 77. On December 17, 2008, Burke filed a surreply. See Docket No. 78. On February 5, 2009, the Defendant filed a surreply. See Docket No. 85.

On June 5, 2009, the Court granted the Defendant's motion for summary judgment as to all twelve claims. See Docket No. 92. On June 10, 2009, Burke filed a timely notice of appeal with the Eighth Circuit Court of Appeals. See Docket No. 94. On June 11, 2009, the Clerk of Court sent Burke a "PLRA Request to Plaintiff" which indicated that Burke had failed to pay the appellate filing fee of \$455.00, or file an application to proceed in forma pauperis (local form B) and a

“Certificate of Inmate Account and Assets” form (local form C). See Docket No. 95. The Clerk’s Office gave Burke a deadline of June 29, 2009, to submit the missing forms. On July 8, 2009, the Eighth Circuit Court of Appeals remanded the case to this Court “for the limited purpose of determining [Burke’s] in forma pauperis status and assessing the appellate filing fees pursuant to 28 U.S.C. Section 1915 as amended by the Prison Litigation Reform Act.” See Docket No. 97. The Eighth Circuit further stated, “In the event the district court grants in forma pauperis status, the district court is directed to calculate and collect the appellate filing fees in accordance with Henderson v. Norris, 129 F.3d 481 (8th Cir. 1997).” See Docket No. 97.

In Henderson, an inmate filed an action in federal district court pursuant to 42 U.S.C. § 1983. The district court dismissed the complaint without prejudice and certified that any appeal would not be taken in good faith. The inmate appealed to the Eighth Circuit Court of Appeals. The clerk of court notified the inmate of the fee requirements under the Prison Litigation Reform Act (PLRA), but the inmate persisted in his appeal without paying the appellate filing fee. The Eighth Circuit established a five-step procedure for requiring prisoner-appellants to pay appellate filing fees in full:

- (1) When the district court notifies the inmate litigant in a civil action of its judgment, the court shall notify the inmate that: (a) the filing of a notice of appeal makes the inmate responsible for paying the full appellate filing fee; (b) by filing a notice of appeal, the inmate consents to prison officials deducting the initial partial filing fee and remaining installments from the inmate’s prison account; (c) the inmate must submit to the clerk of the district court a certified copy of the inmate’s prison account for the last six months within thirty days of filing the notice of appeal; (d) “failure to file the prison account information will result in the assessment of an initial appellate partial fee of \$35 or such other amount that is

reasonable, based on whatever information the court has about the prisoner's finances.”

- (2) When the district court receives an inmate's notice of appeal, it shall assess the appellate filing fees and process the appeal.
- (3) When the district court receives a certified copy of the inmate's prison account, it shall calculate the initial appellate partial filing fee in accordance with 28 U.S.C. § 1915(b)(1) or determine that the provisions of Section 1915(b)(4) apply.
- (4) If the district court does not receive a certified copy of the inmate's prison account within thirty (30) days of the inmate filing the notice of appeal, the court shall calculate an initial partial filing fee of \$35 or other such amount deemed reasonable based upon available financial information of the inmate.
- (5) Upon an inmate's showing of good cause for delay in providing a certified copy of his prison account, the district court may extend the time for providing the copy.

Henderson, 129 F.3d at 484-85.

Burke filed a notice of appeal on June 10, 2009. See Docket No. 94. In accordance with Henderson, Burke had thirty (30) days to file a certified copy of his inmate prison account or pay the full appellate filing fee to the Clerk of Court. Burke's thirty day deadline has passed. Burke has, on prior occasions, filed actions in this Court and appealed to the Eighth Circuit Court of Appeals, and is familiar with the deadlines for submitting filing fees. Further, Burke has paid the filing fees in a timely manner in the previous cases that he has filed in this Court and appealed to the Eighth Circuit. Consequently, the Court is unsure whether Burke received the “PLRA Request to Plaintiff” which was intended to notify Burke that he shall either pay the appellate filing fee of \$455.00, or submit an application to proceed in forma pauperis and a “Certificate of Inmate Account and Assets”

form. As a result, the Court **DIRECTS** the Clerk of Court to send Burke another “PLRA Request to Plaintiff” form and indicate that Burke must pay the appellate filing fee of \$455.00, or submit an application to proceed in forma pauperis (local form B) and a “Certificate of Inmate Account and Assets” form (local form C). Burke shall have until August 3, 2009, to submit the full appellate filing fee or local forms B and C to the following address:

Office of the Clerk of Court
District of North Dakota, Western Division
PO Box 1193
Bismarck, North Dakota 58502-1193.

If Burke fails to submit the appellate filing fee or the appropriate paperwork to determine in forma pauperis status (local forms B and C) by August 3, 2009, the Court will assess an initial partial filing fee of \$35.00 in accordance with the ruling in Henderson v. Norris, 129 F.3d 481 (8th Cir. 1997).

IT IS SO ORDERED.

Dated this 16th day of July, 2009.

/s/ Daniel L. Hovland
Daniel L. Hovland, Chief Judge
United States District Court